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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 856

W. B. WORTHEN COMPANY, AGENT, GEORGE G. WORTHEN AND MOLLIE P. WORTHEN,
Appellants,

vs.

MRS. W. D. THOMAS.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

KENNETH W. COULTER,
FRED A. ISGRIG,
HARRY ROBINSON,
Counsel for Appellee.

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STATEMENT IN DENIAL OF JURISDICTION.

The appellee denies the jurisdiction of this Court to review the above entitled cause on appeal and respectfully states:

1. The appellee contends that this Court does not have jurisdiction in this matter for the reason that the appellant has failed to comply with rule 12 of the rules of the United States Supreme Court, as amended. At the time appellant filed his petition for allowance of appeal, it failed to file its statement as to the jurisdiction of this Court, as provided in rule 12, paragraph 1 of the rules of the Supreme Court of the United States.

2. The only Federal question raised by appellant in its pleadings in the Pulaski Circuit Court was that Act 102 of the Acts of Arkansas of 1933 was in contravention of Article 1, Section 10 of the Constitution of the United States, which prohibits the several states from passing any act which impairs the obligation of a contract. This is the only question that was passed on or could have been passed on by the Supreme Court of Arkansas, and the Supreme Court of the United States, as well as the Supreme Court of Arkansas, have many times held that a new issue cannot be raised for the first time on appeal.

Leonard v. *Luther*, 185 Ark. 572.

Turner v. *Richardson*, 180 U. S. 87.

3. The record in this case does not disclose that there is any privity of contract between the parties to this action, which Act 102 of the Acts of Arkansas for 1933 would impair. Appellant had a writ of garnishment issue out of the Pulaski Circuit Court based upon a judgment secured against the appellee. This Court has many times held that a judgment is not a contract within the meaning of Article 1, Section 10 of the Constitution of the United States, which prohibits the passing of legislation impairing the obligation of a contract.

Swift v. *McPherson*, 232 U. S. 51, 34 Supreme Court 239.

Morly v. *Lakeshore, etc.*, 146 U. S. 162, 13 Supreme Court 54.

Freeland v. *Wilson*, 131 U. S. 405, 9 Supreme Court 763.

Evans-Snyder-Buell Co. v. *McFadden*, 44 C. C. A. 494, 105 Fed. 293, 185 U. S. 505, 22 S. Ct. 758, 58 L. R. A. 900.

4. The opinion of the Supreme Court of Arkansas in this case is as follows:

"Statement by the court delivered November 27, 1933:

"Appellant, W. B. Worthen Company, agent, plaintiff below, procured judgment in person against one, Ralph Thomas, and Mrs. W. D. Thomas, known also as Van Cleve Thomas, appellee herein, doing business as co-partners under the firm name and style of Enterprise Harness Company, based upon personal service of summons upon each of said defendants, in the Pulaski Circuit Court, Second Division, on August 31, 1932, in the sum of $1,200, with interest thereon at 6 per cent. per annum from July 5, 1932, until paid, and costs. The judgment was not appealed from, and remains in full force.

"Pursuant to said judgment, the appellant caused writs of garnishment with allegations and interrogatories to be served upon certain persons, naming them, who answered, denying having any property belonging to either Ralph Thomas or Mrs. W. D. Thomas, and, stating further, that they were not indebted to them, or either of them, in any amount.

"That appellant caused a writ of garnishment, based upon the judgment aforesaid with allegations and interrogatories, to be served upon the Missouri State Life Insurance Company by the sheriff of Pulaski County by delivering same to U. A. Gentry, State Insurance Commissioner, the agent designated by said garnishee for service of process upon it in Pulaski County, wherein appellant alleged that said garnishee had in its hands and possession $5,000 belonging to appellee as shown by the sheriff's return.

"The Legislature enacted Act 102 at its 1933 session, the title and first section of which reads as follows:

"Act 102. An Act to Extend the Exemption Laws of this State.

"Be it enacted by the General Assembly of the State of Arkansas:

"SECTION 1. All moneys paid or payable to any resident of this State, as the insured or beneficiary designated under any insurance policy, or policies, providing for the payment of life, sick, accident and/or disability benefits, shall be exempt from liability or seizure under judicial process of any court, and shall not be subjected to the payment of any debt by contract, or otherwise by any writ, order, judgment or decree of any court, provided that the validity of any sale, assignment, mortgage, pledge or hypothecation of any policy of insurance or if any avails, proceeds or benefits thereof, now made, or hereafter made, shall in no way be affected by the provisions of this Act. Approved: March 16, 1933.

"Appellee filed a motion to dismiss the writ of garnishment against the life insurance company issued and served on March 10, 1933, and for the further purpose of scheduling a certain sum of money owed her by the aforesaid insurance company as exempt from garnishment or seizure under the provisions of Act 102 of 1933, which she alleged exempted the money due her from garnishment or seizure under the judicial process of any court.

"On April 6, 1933, the insurance company answered the garnishment, stating that it had issued theretofore to W. D. Thomas its policy No. 86800 in the amount of $5,000; 'that appellee herein, Mrs. W. D. Thomas, known also as Van Cleve Thomas, was designated as beneficiary therein, and that she had made claim on it for the proceeds of said policy. That by reason of certain accumulations on said policy, that it admitted an indebtedness thereunder in the amount of five thousand, fifty-seven and 80/100 dollars ($5,057.80), and that it was ready to pay this amount to the beneficiary when authorized to do so by an order of the Pulaski Circuit Court.'"

"It stated further: 'that by the provisions of Act 102, enacted by the General Assembly of the State of Arkansas, at its 1933 session, all moneys payable to any resident of this State under a policy of insurance are exempt and not subject to seizure under judicial process of any court. That appellee was then a resident of this State,' and prayed the court to enter an order discharging it of all liability to appellant, and that it be authorized to pay the proceeds of the policy to appellee.

"On April 7, 1933, the court, upon a petition of appellee, found that $2,000 wa a sufficient amount to satisfy any claim or judgment that appellant could have against any of the funds held by the insurance company, and ordered upon the payment of that amount into the registry of the court by it, that said company should be discharged from any liability arising from the writ of garnishment, and that it be discharged with its costs.

"On April 20, 1933, appellant filed its response to the motion to dismiss the writ of garnishment, and on April 29 it filed an amendment thereto in which it resisted the aforesaid motion to dismiss, challenging Act 102 of 1933 as unconstitutional and void.

"On the hearing, the court found that the insurance company had paid $2,000 into the registry of the court pursuant to its order, and was discharged from further liability as garnishee, which was held subject to further order of the court, and that said sum of money was exempt from liability or seizure under any judicial process of any court and granted said motion and schedule. Ordered that the money paid into court be released from liability under the garnishment, and ordered the clerk to pay over the money to Mrs. W. D. Thomas, or her attorney of record, taking a receipt therefor on the margin of the record. Appellant excepted to the court's action in granting the motion and schedule, and prayed an appeal to the Supreme Court.

"Kirby, J. (after stating the facts). The only question for determination here is the constitutionality of Act 102 of 1933, approved March 16, 1933.

"It is insisted that said Act is violative of paragraph 10, article 1, of the Constitution of the United States, as impairing the obligations of a contract, and paragraph 17 of article 2 of the Constitution of Arkansas.

"In *Acree* v. *Whitley*, 136 Ark. 149, 206 S. W. 137, it was said: 'It may be stated at the outset that paragraph 21 does not relate to the absolute exemption of personal property allowed a resident of this State, as exempt from certain debts and liabilities under paragraphs 1 and 2 of article 9 of our Constitution. The reason is beneficiaries in insurance policies, as well as other persons, are obliged to pay judgments against them in favor of third persons and exemptions from execution and other process of the court are fixed by the sections of the Constitution above referred to. The statute in question was not enacted for the purpose of allowing beneficiaries exemptions which they are not entitled to under the Constitution and laws of this State, but the act was passed for the purpose of exempting these funds from the operation of our general statutes regulating issuance of garnishments and proceedings thereunder.'

"It is true this act is broader in its terms than the one construed in the above case, since it exempts all moneys payable to any resident of the State: 'as the insured or beneficiary designated under any insurance policy or policies providing for the payment of life, etc., * * * from liability or seizure under judicial process of any court, and shall not be subject to the payment of any debt by contract or otherwise by any writ, order, judgment or decree of any court, * * * provided that the validity of any sale, mortgage, or hypothecation of any policy of insurance, etc., shall in no way be affected by the provisions of this act.'

"As said by this court of the other statute, it can well be said of this statute, Act 102 of 1933, that it 'does not relate to the absolute exemption of personal prop-

erty allowed a resident of this State as exempt from certain debts and liabilities under paragraphs 1 and 2 of article 9 of our Constitution. * * * was not enacted for the purpose of allowing beneficiaries exemptions which they are not entitled to under the Constitution and laws of this State, but the act was passed for the purpose of exempting these funds from the operation of our general statutes regulating issuance of garnishments and proceedings thereunder.'

"This could be done without violation of our Constitution. No creditor has the right to any particular remedy, and such statutes prohibit only the issuance of garnishments against such funds as already held by our court; and neither does it violate the Constitution of the United States in impairing the obligations of a contract by prohibiting the use of certain procedure in subjecting certain insurance funds to the payment of a judgment against the beneficiary in an insurance policy—funds that were not in existence when the judgment was obtained and were allowed to be provided for by the insured whom the law allows to expend a certain amount of money to provide insurance for the benefit of his wife.

"The law allows the equities in cases to be considered in the construction of the statutes relating to the subject in question. *Evans-Snider-Buel Co.* v. *McFadden*, 58 L. R. A. 900.

"The judgment is affirmed. Mehaffy, J., dissents."

The Supreme Court of Arkansas in its opinion has construed the Act in question—Act 102 of the Acts of Arkansas for 1933—as a remedial statute, in that Act 102 only affects the issuance of garnishments in certain cases. There was no such writ as a writ of garnishment in the common law, and it naturally follows that if the legislature of the State of Arkansas had the right to pass an act making the writ of garnishment available, then it cer-

tainly has the right to take away all of the right of garnishment or any part thereof.

Greene v. *Abraham*, 43 Ark. 420.
Freeburn v. *Smith*, 2 Wall. 160-175, 17 L. Ed. 923.
Baker v. *Kilgore*, 145 U. S. 487, 36 L. Ed. 786.
Terry v. *Anderson*, 95 U. S. 628-633, 24 L. Ed. 365-6.

It is therefore respectfully submitted that this Court is without jurisdiction to hear and determine this appeal.

KENNETH W. COULTER,
FRED A. ISGRIG,
HARRY ROBINSON,
Counsel for Appellee.

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MOTION TO DISMISS OR AFFIRM.

Comes Mrs. W. D. Thomas, appellee, by Kenneth W. Coulter, Fred A. Isgrig and Harry Robinson, her counsel, and moves this Court to dismiss the appeal in this cause for want of jurisdiction and because the appeal is informal, irregular and insufficient for the reasons stated in the annexed argument and statement, denying jurisdiction and upon other grounds; and the said appellee also moves this Court to affirm the judgment of the Supreme Court of the State of Arkansas herein, upon the ground that it is manifest that the appeal herein was taken for delay only, and that the question upon which it is claimed that the jurisdiction depends is so frivolous as not to need further argument.

KENNETH W. COULTER,
FRED A. ISGRIG,
HARRY ROBINSON,
Attorneys and Counsel for Appellee.

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